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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5532

ORIGINAL COPY

HAROLD STRUBE, Appellant,

ORIGINAL COPY

v.

DALE SUMNER, Appellee.

ON APPEAL FROM THE SUPREME COURT

OF INDIANA

MOTION TO DISMISS

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v.

DALE SUMNER, Appellee.

ON APPEAL FROM THE SUPREME COURT

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MOTION TO DISMISS

Pursuant to Rule 16(1), subsections (a) and (b), of the Rules of the Supreme Court of the United States, Appellee moves the Court to dismiss the appeal herein on the ground that it is not within the jurisdiction of this Court because not taken in conformity with statutory requirements, and on the further ground that it does not raise a substantial federal question.

JURISDICTION

The jurisdiction of this Court is claimed under 28 U.S.C. § 1257(2) which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

It affirmatively appears from the record that Appellant is appealing from the Supreme Court of Indiana when he should be appealing from the Indiana Court of Appeals in order to properly invoke jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2). (See Appellant's Jurisdictional Statement, page 1).

QUESTION PRESENTED

Whether Marion County Small Claims Court Rule 16(B), which requires a litigant to post a bond in the amount of the judgment, plus interest and costs, as a prerequisite to appeal for de novo review, satisfies the requirements of the Equal Protection Clause of the 14th Amendment of the United States Constitution by serving a legitimate state purpose, when the litigant is also afforded the right to transfer the case to a trial court where no bond is necessary to perfect an appeal but from which de novo review is unavailable.

STATUTORY PROVISIONS AND RULES

In addition to Section I, Fourteenth Amendment, United States Constitution and 28 U.S.C. § 1257(2), the only provisions of law involved in this case are provisions of the Indiana Code and Rules of Practice and Procedure of the Small Claims Court of Marion County, Indiana, as follows:

IC 33-11.6-4-5

ADOPTION OF RULES

The judge of the circuit court, assisted by the judges of the small claims court, shall make and adopt uniform rules for conducting the business of the small claims court and for appeals therefrom according to a simplified procedure and in the spirit of sections 6[33-11.6-4-6] and 8[33-11.6-4-8] of this chapter.

IC 33-11.6-4-10

WAIVER OF TRIAL BY JURY

The filing of a civil claim in the small claims court shall be deemed a waiver of trial by jury by the plaintiff. The defendant in such case shall be deemed to have waived his right to trial by jury unless he requests such a trial prior to the commencement of the trial of the case in the small claims court. At the time of such request the small claims court shall transfer the claim to the circuit, superior or municipal courts of the county in which the small claims court is located. The defendant shall pay all costs necessary for filing the claim in the circuit or superior courts as if the cause had initially been filed in that court.

IC 33-11.6-4-14

APPEALS

All appeals from judgments of the small claims court shall be taken to the circuit or superior courts of the county and tried de novo. All appeals from proceedings under IC 1971, 33-11.6-6 shall be taken to a criminal court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

IC 33-11.6-4-14
(amended effective January 1, 1979)

APPEALS

All appeals from judgments of the small claims court shall be taken to the circuit or superior court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

Marion Small Claims Rule 5

COUNTERCLAIMS

(A) If the defendant has any counterclaim arising from the same transaction or occurrence which is the subject matter of the plaintiff's claim, and which is within the jurisdictional limits of the Court, he may bring or mail a statement of such claim to the small claims Court within such time as will allow the Court to mail a copy to the plaintiff and be received by him at least seven (7) calendar

days prior to the hearing. If such counterclaim is not received within this time the plaintiff may request a continuance pursuant to M.S.C. 9.

(B) Counterclaim in excess of jurisdiction. The defendant in a counterclaim may waive the excess of his claim over the jurisdictional maximum to bring it within the jurisdiction of the small claims docket. If the defendant elects to waive a portion of his counterclaim, he may not later maintain a separate action, for the remainder of such claim.

Marion Small Claims Rule 13

TRANSFER TO MUNICIPAL COURT FOR JURY TRIAL

(A) Where a defendant has requested a trial by Jury pursuant to 1971 IC 33-11.6-4-10 said cause shall be transferred to the Municipal Court of Marion County for trial. The defendant shall pay all costs necessary for filing the claim in said court as if the cause had initially been filed in said court.

(B) Upon the transfer of said cause the Judge shall transmit all papers to the Clerk of the Marion Municipal Court along with the applicable costs within twenty (20) days from the date of such filing of such request, with tendered costs.

Marion Small Claims Rule 16

APPEALS

(B) Appeal Bond. The appellant shall, except in cases where the same is dispensed with by law, file with the court a bond, with security to be approved by the judge, payable to the appellee, in a sum sufficient to secure the claim of the appellee and interests and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the circuit court.

The Rules of Practice and Procedure of the Small Claims Court may be found in Appendix 1 of this Motion to Dismiss.

STATEMENT OF THE CASE

Appellant's Statement of the Case is substantially correct and complete. Any errors or omissions will be treated in the Argument section of Motion to Dismiss.

ARGUMENT

A.

THIS APPEAL FROM THE SUPREME COURT OF INDIANA SHOULD BE DISMISSED FOR WANT OF JURISDICTION BECAUSE NOT TAKEN IN CONFORMITY TO 28 U.S.C. § 1257(2)

The statute conferring jurisdiction on this Court to review final judgments of state courts where the validity of a state statute is questioned on the ground of its repugnancy to the Constitution, and the decision upholds its validity, requires that the appeal be taken from . . . "the highest court of the State in which a decision could be had. . . ." 28 U.S.C. § 1257(2).

The Indiana Court of Appeals rendered its opinion in this case on December 20, 1978, and denied appellant's Petition for Rehearing on April 17, 1979. Appellant then petitioned for transfer of the case to the Supreme Court of Indiana, which petition was denied on July 23, 1979, without reason or opinion for that denial (Appendix "A" to the Jurisdictional Statement at 9).

This Court has consistently held that when the highest court of a state (here the Supreme Court of Indiana) declines to exercise its authority, only the judgment of the intermediate court (here the Indiana Court of Appeals) is reviewable under 28 U.S.C. § 1257. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678, n. 1 (1968); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923); Sullivan v. Texas, 207 U.S. 416, 422 (1908).

In Randall v. Board of Commissioners of Tippecanoe County, Indiana, 261 U.S. 252 (1923), this Court considered a case presenting an almost identical procedural history to that of the case at bar. This Court held that it must dismiss a writ of error to the Supreme Court of Indiana because the writ clearly should have been issued to the intermediate appellate court. The statutory basis for the dismissal was Judicial Code § 237, (Act March 3, 1911, c. 231, 36 Stat. 1156, Comp. Stat. 1916 § 1214), the precursor of the current 28 U.S.C. § 1257, and identical to § 1257 in every pertinent respect.

It is abundantly clear from the record that Appellant, by presenting this appeal from the Indiana Supreme Court

rather than the Indiana Court of Appeals, is appealing from the wrong court and, therefore, the order denying transfer by the Supreme Court of Indiana is not reviewable by this Court. Accordingly, this Court is without jurisdiction in this case and the appeal should be dismissed.

B.

MARION COUNTY SMALL CLAIMS COURT RULE 16(B), REQUIRING AN APPEAL BOND FOR DE NOVO APPEALS, IS JUSTIFIED BY THE FACT THAT DE NOVO APPEALS ARE AVAILABLE FROM NO OTHER COURT IN INDIANA; IT IS RATIONALLY RELATED TO THE LEGITIMATE STATE PURPOSE OF DETERRING FRIVOLOUS APPEALS AND DOES NOT CONTRAVENE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION; THE EFFECT OF THE RULE IS EASILY AVOIDED BY DEFENDANT'S REQUEST FOR TRANSFER TO A COURT OF RECORD AND A JURY TRIAL; THEREFORE, ANY POTENTIAL FOR DISCRIMINATORY IMPACT IN THE RULE CLEARLY DOES NOT RISE TO THE LEVEL OF A SUBSTANTIAL FEDERAL QUESTION

Special handling of small claims cases is a relatively new phenomenon in Indiana. In the early 1970's, various acts of the Legislature provided for the establishment of "small claims dockets" in the circuit courts of Brown, Franklin and Union Counties. IC §§ 33-4-1-7.1, 33-4-1-24.1, 33-4-1-81.1. Simplified procedures were to be used for these dockets, but no de novo review was available and no appeal bonds were required to perfect appeals, although if posted, they acted to stay the execution of judgments. In 1971, the Indiana Legislature enacted IC § 33-11.6-1-1 et seq., the comprehensive law "establishing a small claims court in each county containing a consolidated city of the first class." IC § 33-11.6-1-3. As of the 1970 census, Indianapolis was the only city of sufficient size to constitute a consolidated city of the first class; therefore, Marion County is the only county to date which has established a small claims court pursuant to this legislative enactment. At the present time, there are no other small claims courts in Indiana of this nature.

Unlike the county courts which have small claims dockets, the Marion County Small Claims Court is not a court of record, nor there is provision for a trial by jury. IC § 33-11.6-1-4, IC § 33-11.6-4-9. Appeal from a judgment of the Marion County Small Claims Court is by de novo review in the county superior or circuit court. IC § 33-11.6-4-14. Pursuant to IC § 33-11.6-4-5, the Judge of the Marion County Circuit Court, assisted by Judges of the small claims court, adopted uniform rules for the small claims court and for appeals therefrom, effective January 1, 1976. (See Appendix 1 to this Motion to Dismiss).

Marion County Small Claims Court Rule 16(B) requires the posting of an appeal bond to perfect an appeal from a judgment rendered in that court. Appellant could not afford an appeal bond and his appeal from an adverse judgment of the small claims court was dismissed. In essence, he claims the requirement of an appeal bond from the small claims court is unfair because no other appellants from other Indiana courts are required to post bond to perfect an appeal.

It is true that appeals from all other trial courts in Indiana are governed by Rule 6(B) of the Indiana Rules of Appellate Procedure, which provides in pertinent part: "No appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order." But there is good reason for the difference in the rules for appeal.

Communities throughout the country in recent years have created small claims courts in an effort to relieve the regular trial courts of heavy calendars and, in some instances, serious backlogs. By simplifying and deformalizing procedures, small claims courts have been able to offer speedier justice to more litigants. The simplified procedures have allowed litigants to prosecute small claims without counsel; claims which would otherwise be economically unfeasible to pursue because of attorney fees and court costs. Litigants

in the Marion County Small Claims Court are permitted representation by counsel, which representation this Appellant had. Litigants in the small claims courts of some states, Michigan, for example, waive the right to counsel, trial by jury, and appeal when a litigant makes the decision to remain in that court. MCLA § 600.84 12. Parties who choose to litigate in a small claims court, such as that of Marion County, relinquish some of the advantages and safeguards of a regular court in exchange for the advantages of less expense and speedier dispute resolution. It is the right to one's day in court, not the right to appeal, which is fundamental and protected by the Constitution.

Appellant contends that he was forced, by Appellee's choice of forum, into a small group of litigants who must post bond to perfect an appeal. But this is patently erroneous. The plaintiff initially chooses the Marion County Small Claims Court, and in so doing, waives the right to trial by jury and agrees to abide by the procedures and rules of the court, including the appeal bond rule. Contrary to Appellant's contention, the appeal bond rule applies equally to plaintiff-appellants who lose defending a counterclaim and wish to appeal. Inasmuch as counterclaims are permitted pursuant to Marion County Small Claims Court Rule 5, plaintiffs also risk the appeal bond requirement when they choose to litigate in the simpler forum. There is no rationale behind a rule that would require a losing plaintiff, against whom no counterclaim was filed, to post bond to perfect an appeal, as there would be no judgment to secure. There is no discrimination in the requirement that an unsuccessful defendant or a plaintiff who loses on a counterclaim post an appeal bond to secure the judgment. Caulk v. Nichols, 281 A.2d 24, 26-27 (Del. 1971), appeal dismissed, 408 U.S. 901 (1972).

In recognition of the inherent drawbacks to the simplified procedures of small claims courts, the Marion County Small Claims Court has been structured so that no party can be forced by an opponent to litigate a case in the small claims court. After the initial choice by the plaintiff to litigate his claim in the small claims court, the defendant must assess the advantages and disadvantages to him of litigating the case there rather than in the Municipal Court of Marion County. If a defendant's decision is to litigate the case in the Municipal Court (from which no appeal bond is required to perfect an appeal), he need only inform the small claims court of that intention before trial, and the case will be transferred to the Municipal Court of Marion County for trial by jury. IC § 33-11.6-4-10; Marion County Small Claims Court Rule 13. Inasmuch as Appellant was represented by counsel at trial in the Marion County Small Claims Court, it is presumed that said counsel informed Appellant of this right.

It has been established, then, that Appellant was not forced by Appellee into the position that he post an appeal bond to perfect his appeal from the Marion County Small Claims Court. He must be deemed legally to have chosen that position as part of his calculated risk in choosing to remain in small claims court. Nevertheless, he is in a category of appellants apparently different from all other appellants perfecting appeals from Indiana Courts. No other Indiana appellants are required to post bond to perfect an appeal. But it is equally true that no other Indiana appellants receive de novo review of their cases on appeal, a valuable right guaranteed to small claims court appellants. This distinction alone is justification for the difference in appeal rules.

But a more compelling reason for the difference in appeal rules is the deterrent effect the appeal bond rule can have on frivolous appeals. Appellant admits that this purpose is a legitimate governmental objective, but suggests that the appeal bond also deters meritorious appeals by those who cannot or will not post bond. [See Jurisdictional Statement at 17 et seq.] Appellee admits that the deterrent is not a perfect

one, but it is rationally related to its purpose and is presently the best available deterrent. Unless a fundamental interest or suspect classification is at issue, a classification having some reasonable basis does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Cleland v. National College of Business, 435 U.S. 213 (1970).

Because small claims court litigation is quick, easy, and inexpensive, many claims which would otherwise be settled out of court or simply dropped may be filed in that forum if the opportunity is available. This is equally true of counterclaims. Therefore, it is expected that a higher percentage of frivolous claims and counterclaims may be brought in small claims court as compared with the municipal or superior courts. Appellate review of a trial court decision, whether rendered by court or by jury, is usually limited to an error in law or abuse of discretion. But an appeal from the Marion County Small Claims Court receives de novo review, which allows the litigants to again try the merits of the case. Thus, an unimpeded right to a retrial on the merits opens the door to frivolous and insubstantial claims by unsuccessful small claims court litigants who desire another opportunity to obtain a favorable decision.

A deterrent to frivolous claims is needed. The posting of an appeal bond in the amount of the judgment, plus costs, is a reasonable and effective deterrent which not only serves a legitimate governmental interest, but also protects and insures the judgment of the successful party. As stated above, the appeal bond requirement can be avoided by a small claims court litigant, be he plaintiff or defendant, simply by requesting removal of the case to the Municipal Court of Marion County for trial by jury.

Although the Indiana Court of Appeals and Appellant have stated that there is no contention of wealth discrimination, it is apparent that Appellant is also challenging the appeal bond rule because his indigency caused it to adversely affect him. If appellant had removed his case to the Municipal Court of Marion County so as to avoid the appeal bond rule, he could have petitioned for leave to proceed in forma pauperis just as he did, successfully, when he attempted to appeal the small claims court decision, and as he seeks to do before this Court. Appellant had a choice of alternatives; it was not unfair to require him to make that choice. Where wealth is involved, the equal protection clause does not require absolute equality or precisely equal advantages. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

The Supreme Court of Rhode Island has upheld a similar appeal bond requirement when challenged by indigents' claims that it violated their right to equal protection. Moreover, there was no indication that the indigents there could have avoided the appeal bond rule as Appellant could have done in this case. Jones v. Aciz, 109 R.I. 612, 289 A.2d 44 (1972). This Court dismissed the appeal sub nom. Phillips v. Housing Authority, 409 U.S. 1094 (1972). This Court also dismissed, for want of a substantial federal question, a similar case wherein the Supreme Court of Delaware upheld the appeal bond requirement of the Justice of the Peace Courts of Delaware when challenged on several equal protection grounds. Caulk v. Nichols, supra. The case at bar presents no more substantial federal question.

The appeal bond rule is rationally related to the valid state purpose of deterring frivolous appeals and serves that purpose well. Although Appellant contends that it imposes an unfair and heavy burden on poor people who cannot meet its requirements, the option of litigating in the Municipal Court of Marion County to avoid the rule is always available by merely requesting a trial by jury. The benefits of the rule as a deterrent to frivolous claims outweigh its

drawbacks, and, until a more effective deterrent is available, it must be allowed to stand.

Appellant asserts that since the rule affects the "administration of justice" it should be subjected to a more exacting level of equal protection scrutiny than mere rationality. But upon examination, Appellant's argument is specious. No suspect classification is involved here, nor is there present the invidious discrimination proscribed by the equal protection clause of the Fourteenth Amendment. Appellant is a member of a de facto class of litigants in the Marion County Small Claims Court. Contrary to Appellant's contention, there is no fundamental interest involved here which would require a higher level of scrutiny of the appeal bond rule. Lindsey v. Normet, 405 U.S. 56 (1972). This is a civil case, and Appellant has a fundamental right of access to the courts, which he received. He has no fundamental right to a retrial on the merits, nor does he have a fundamental right to any appeal at all. Appellant could have appealed if he had posted bond; moreover, he could have appealed without posting bond if he had removed the case to the Municipal Court of Marion County for jury trial. No more is required by the Constitution. Griffin v. Illinois, 351 U.S. 12 (1956). The applicable standard in this case is rationality, and that clearly has been met. Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973).

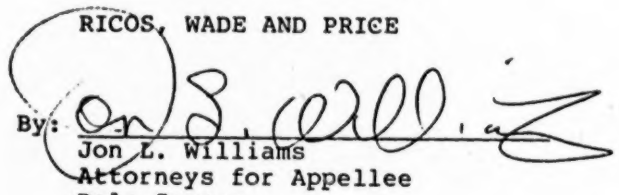
Appellant has not been fundamentally wronged or discriminated against unfairly. He raises no issues which approach the level of a substantial federal question. The rule of which he complains well serves a valid state purpose, is extremely limited in its impact, and can be avoided by any litigant simply by choosing to litigate the case in the Municipal Court of Marion County. The Indiana Supreme Court saw no reason to review the obviously correct opinion of the Indiana Court of Appeals, and there is no reason for this Court to grant further review.

CONCLUSION

Appellee respectfully submits that this case is not a proper one for review by this Court, and that this appeal should be dismissed for want of jurisdiction because not taken in conformity with statutory requirements and for want of a substantial federal question.

Respectfully submitted,

RICOS, WADE AND PRICE

By: 
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